

AUG 13 1976

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-1809

ALAN RABINOVITCH,

Appellant,

v.

EWALD B. NYQUIST, *Commissioner of Education of the
State of New York, et al.,*

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Appellees move pursuant to Rule 16 of the Rules of this Court for dismissal of the appeal from that part of the judgment of the United States District Courts for the Western and Eastern Districts of New York, dated March 26, 1976, denying appellant retroactive damages equal to the amount of state financial aid he alleges he would have received but for this enforcement of New York Education Law § 661(3) and, in the alternative, for an affirmance of that part of the March 26 judgment.

This Motion to Dismiss or Affirm is submitted with a Jurisdictional Statement in *Nyquist v. Mauclet*, Doc. No.

, wherein the same public officials and agencies appeal from the March 26 judgment insofar as it declares New York Education Law ("NYEL") 661(3) invalid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and permanently enjoins its enforcement. The Statement of the Case at pp. 4-7 of the Jurisdictional Statement in *Mauclet v. Nyquist* is incorporated by reference.

Appellant's claim for retroactive damages is foreclosed by prior decisions of this Court.

"[W]hen the action is in essence one for recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit" *Edelman v. Jordan*, 415 U.S. 651, 663 (1974), quoting *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). The state's Eleventh Amendment sovereign immunity does not bar injunctive relief against a public official which requires him to conform his conduct to the Fourteenth Amendment, *Ex parte Young*, 209 U.S. 123 (1908), or the "ancillary effect" on the public treasury that such prospective compliance may have. *Edelman v. Jordan*, *supra* at 667-668. It does not bar monetary awards when the state consents to be sued on such claims or otherwise waives its immunity, *Edelman v. Jordan*, *supra* at 673-677, or when Congress, acting within its delegated powers, has abrogated the state's immunity through specific legislation. *Fitzpatrick v. Bitzer*, — U.S. —, 44 U.S.L.W. 5120, 5121-5123 (June 28, 1976).

Appellant's claim for damages falls squarely within the first stated rule barring such awards and not within any of the enumerated exceptions. The damages sought are monies appellant alleges he would have received from state tuition assistance and a Regents Scholarship for the academic years 1973-1974 and 1974-1975 (Amended Com-

plaint, Prayer for Relief ¶ 5), all of which accrued prior to the entry of the judgment in March of 1976.* As such, they are identical with the damages sought by the welfare recipients in *Edelman* and held barred, i.e. "an accrued monetary liability which must be met from the general revenues of a State" (Id. at 664) which arose at a time when appellees were "under no court-imposed obligation to conform to a different standard" (Id. at 668-669).

Appellant's several efforts to distinguish his case from *Edelman* are without merit. A state is not *without sovereign immunity* in a suit challenging a statute regulating the distribution of public benefits simply because some of the classifying factors adopted by the statute relate to alienage. See Jurisdictional Statement, pp. 8-9. While appellant is correct in stating that federal power over immigration and naturalization is exclusive, this power has never been held to foreclose states from using alienage as a classifying criterion, *De Canas v. Bica*, — U.S. —, 44 U.S.L.W. 4235 (February 25, 1976); *Hines v. Davidowitz*, 312 U.S. 52 (1941), particularly with respect to the distribution of public benefits. *Examining Board of Engineers, Architects and Surveyors v. De Otero*, — U.S. —, 44 U.S.L.W. 4890, 4900 (June 15, 1976); *Graham v. Richardson*, 403 U.S. 365, 372 (1971); *Crane v. New York*, 239 U.S. 195 (1915); *Heim v. McCall*, 239 U.S. 175 (1915). Nor, of course, did New York consent to suits by aliens for damages or waive its sovereign immunity by adopting the Constitution. Jurisdictional Statement, p. 8. Waiver will only be found "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construc-

* In his Jurisdictional Statement, p. 5, appellant also claims damages for the 1975-1976 academic year of which only three months remained after the entry of the judgment. Appellant is of course entitled to have appellees conform with the judgment for this three month period and provide him with aid assuming he is otherwise qualified.

tion.' " *Edelman v. Jordan*, *supra* at 673, quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909). This Court has refused to find implied or constructive consent to suits where Eleventh Amendment immunity was involved. *Edelman v. Jordan*, *supra* at 673-674.

Appellant's further argument that Congressional intent to abrogate the states' sovereign immunity is expressed or implied by the early Civil Rights Acts, particularly 42 U.S.C. § 1981, has already been rejected. See Jurisdictional Statement, pp. 9-13. This statute and 42 U.S.C. § 1983 with their jurisdictional counterpart, 28 U.S. § 1343(3) and (4), have served as the basis for the very federal actions in which the Eleventh Amendment has been held to bar the relief requested herein, e.g., *Edelman v. Jordan*, *supra*; *Rothstein v. Wyman*, 467 F.2d 226 (2d Cir. 1972) cert. den. 411 U.S. 921 (1973). Substantially the same argument made by appellant with respect to § 1981 as authorizing damage awards was presented by the *Edelman* respondents with respect to § 1983 and rejected by a majority of the Court. *Edelman v. Jordan*, *supra* at 679-681. This majority view was recently reaffirmed in *Bitzer v. Fitzpatrick*, *supra* at 5122, when the Court distinguished *Edelman* from the Title VII claim for damages there involved on the ground that the *Edelman* claim was not supported by the "threshold fact of congressional authorization" that supported the Title VII claim. See also *Runyon v. McCrary*, 44 U.S.L.W. 5034, 5041-5042 (June 25, 1976).

Appellant's concluding argument that the New York State Higher Education Services Corporation is not a state agency for Eleventh Amendment purposes and thus without sovereign immunity is equally without merit. As noted above, the state is the real party in interest when the monetary award must be met from "general revenues." *Edelman v. Jordan*, *supra*, at 664, 665. NYSHESC receives the bulk of its money from state tax levies (Jurisdictional Statement, p. 13) and, as a result, any award against NYSHESC "must inevitably come from general revenues" of the state. *Edelman v. Jordan*, *supra* at 666.

CONCLUSION

For the foregoing reasons, the appeal from that part judgment of the District Court, dated March 26, 1976, denying appellant damages should be dismissed or, alternatively, that portion of judgment should be affirmed.

Dated: New York, New York, August 12, 1976.

Respectfully submitted,

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